U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0082

WILLIAM R. EASON, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS, INCORPORATED	)	DATE ISSUED: Sept. 20, 2016
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Dana Rosen, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-LHC-00354) of Administrative Law Judge Dana Rosen rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a supervisor in employer's shipyard, alleged that he hurt his left shoulder on March 16, 2011, when his head struck a piece of protruding metal, jerking his head and neck and knocking off his hard hat. Tr. at 20-22; CX 3a; EX 11 at 6-10. Claimant did not immediately report the work incident to his employer nor did he seek

immediate medical attention. Tr. at 25, 32-33; EX 11 at 6-13. He did not lose any time from work and continued to perform his regular work. *See* Tr. at 22-23.

On May 5, 2011, claimant saw Dr. Holleran, his family physician, for a toe complaint. Dr. Holleran noted, *inter alia*, a past medical history of shoulder pain, diagnosed bicipital tenosynovitis and prescribed meloxicam. CX 4 a-c; EX 1 at 1-3; Tr. at 23-24. Claimant followed up on June 14, 2011 with Dr. Saveika, a physical medicine specialist in Dr. Holleran's medical group, for a complaint of left shoulder pain. Dr. Saveika reported that the onset of claimant's moderate shoulder pain was gradual and had been occurring in a persistent, constant pattern for months, adding that the pain had occurred before but had previously resolved with the use of nonsteroidal anti-inflammatory drugs. Dr. Saveika also noted that the shoulder pain was aggravated with overhead work and that claimant denied any trauma. Dr. Saveika diagnosed rotator cuff syndrome and prescribed medication and an injection for claimant's left shoulder. CX 4d-g; EX 1 at 47; *see also* Tr. at 24-25. A left shoulder x-ray performed on that date revealed mild degenerative changes and possible calcific tendonitis. CX 4h; EX 1 at 8.

Claimant testified that Dr. Saveika told him that his shoulder condition was related to his hitting his head at work and advised him to report his injury to the shipyard clinic. Tr. at 25, 33; EX 11 at 12, 15. On June 15, 2011, claimant presented to the shipyard clinic where he reported that on March 16, 2011 he struck his hard hat on an overhead protrusion and that he started experiencing left shoulder pain. EX 13 at 3. The following day, claimant completed employer's Accident Questionnaire, indicating that he had reported the March 16, 2011 injury to his foreman Dana Cowell on April 1, 2011. CX 1; EX 4. A General Foreman Accident Questionnaire dated June 17, 2011 states that claimant did not report the accident to Ms. Cowell until June 15, 2011.[1] CX 2; EX 3.

After reporting his injury to employer, claimant continued treatment with Dr. Saveika for his shoulder condition, which Dr. Saveika diagnosed as osteoarthrosis and rotator cuff syndrome. CX 4j-y. An MRI performed on October 12, 2011 notes a clinical history of "shoulder pain after trauma," and was interpreted as showing hypertrophic tendinopathy with developing bursitis and mild arch stenosis, with no rotator cuff tear. CX 6a-b.

[1] Claimant testified on deposition that prior to filing the injury report, he had told Ms. Cowell that he was seeing a doctor for shoulder pain but he did not tell her it was associated with a work injury. EX 11 at 10-12. Similarly, Ms. Cowell testified that prior to June 15, 2011, claimant had complained to her and another supervisor that his shoulder hurt but that he never said it was due to something at work. Tr. at 40. She further testified that claimant began complaining that his shoulder hurt approximately three months before he went to the shipyard clinic on June 15, 2011. *Id*. at 46-47.

On November 1, 2011, claimant requested a voluntary early retirement to commence on February 1, 2012. EX 12; *see also* Tr. at 27-28; EX 11 at 5, 19. On November 2, 2011, claimant filed a claim for benefits under the Act for a left shoulder injury resulting from the March 16, 2011 workplace incident. CX 3; EX 5.

Claimant commenced treatment on November 7, 2011, with Dr. Patel, an orthopedic surgeon, for his left shoulder condition. Dr. Patel noted that claimant injured his left shoulder at work and that the pain was progressively getting worse; Dr. Patel diagnosed shoulder joint pain and a sprain. CX 7a; EX 7 at 1. An MRI performed at Dr. Patel's request on November 16, 2011 showed rotator cuff tendinopathy with no rotator cuff tear or labral tears. CX 6c. After several months of treatment, CX 7d-n, Dr. Patel performed left shoulder arthroscopic surgery on August 23, 2012. The post-operative diagnoses were left shoulder with impingement, possible rotator cuff tear, AC joint arthritis, synovitis, and shoulder pain. CX 8; EX 7 at 5. Although claimant had voluntarily retired prior to his shoulder surgery, Dr. Patel nonetheless reported that claimant was in out-of-work status from August 23, 2012 to October 2, 2012. CX 7n. Employer paid for the medical treatment of claimant's left shoulder, including the surgery. CX 12; EX 14; *see also* Tr. at 28.

In a letter to Dr. Saveika dated June 29, 2012, employer's attorney inquired whether, if claimant had advised Dr. Saveika that he had an acute head, neck or shoulder injury in March 2011, the doctor would have noted that history in his medical report. EX 2 at 2-3. Dr. Saveika reported that if claimant had indicated an acute injury in March 2011, the doctor would have noted it, adding that "an acute injury of any of the areas you reference would have a different diagnostic and therapeutic algorithm." EX 2 at 1; CX 5.

Employer's attorney also posed questions to Dr. Patel in a letter dated June 29, 2012. EX 8 at 3-4. In response, Dr. Patel initially noted that claimant had indicated to him that he had injured his left shoulder at work. However, Dr. Patel acknowledged that the history he received from claimant was inconsistent with the contemporaneous history reported by Dr. Saveika which reflected that claimant had a gradual onset of left shoulder pain. Dr. Patel opined that claimant's bursitis is more probably related to a disease of life that is consistent with his age and body habitus. Dr. Patel stated that he could not definitively conclude that claimant's shoulder condition is related to a work injury in view of claimant's previous treatment for shoulder pain and the absence of evidence of any rotator cuff tear or labral pathology on his arthrogram. EX 8 at 1-2; CX 10a-b.

Dr. Baddar, an occupational medicine specialist, who reviewed claimant's medical records on behalf of employer, concurred with Dr. Saveika's opinion that claimant's bursitis is more probably related to "disease of life," adding that "[c]ausation of a bursitis of the shoulder doesn't fit with the story of striking a protrusion with a hard hat." EX 9 at 1. Dr. Baddar further stated that claimant's bursitis and any disability due to the surgery

claimant underwent is more probably than not the result of a disease of life "and not the result, in whole or part, [of] a work-related injury." *Id*. at 2.

In her Decision and Order, the administrative law judge found claimant entitled to the Section 20(a), 33 U.S.C. §920(a), presumption that his shoulder condition is related to the March 16, 2011 work incident, and found that employer did not rebut the presumption. She found, in the alternative, that, considering the evidence as a whole, claimant's left shoulder condition is causally related to the work incident. The administrative law judge further found the claim is not barred by claimant's failure to give timely notice of his injury under Section 12(a) of the Act, 33 U.S.C. §912(a), as employer failed to establish pursuant to Section 12(d), 33 U.S.C. §912(d), that it was prejudiced by claimant's failure to provide timely notice of his injury. She determined that claimant is entitled to temporary total disability benefits for the period from August 23, 2012 through October 2, 2012, while he was recovering from shoulder surgery notwithstanding that he was voluntarily retired at that time. Lastly, the administrative law judge found that employer is liable for all reasonable and necessary medical expenses under Section 7 of the Act, 33 U.S.C. §907, for claimant's left shoulder condition.

On appeal, employer challenges the award of temporary total disability benefits, contending that claimant is not entitled to disability compensation for the period during which he was recuperating from shoulder surgery because he had voluntarily retired prior to undergoing surgery. In the alternative, employer challenges the administrative law judge's findings that the claim is not barred under Section 12 and that there is a causal relationship between claimant's left shoulder condition and the March 16, 2011 work incident. Claimant responds, urging the Board to reject employer's contentions of error. Employer has filed a reply brief.

We first address employer's contention that the administrative law judge's award of temporary total disability benefits must be reversed in light of the Board's recent decision in *Moody v. Huntington Ingalls, Inc.*, 50 BRBS 9 (2016), *recon. denied*, BRB No. 15-0314 (May 10, 2016), appeal pending, No. 16-1773 (4th Cir.), which was issued subsequent to the administrative law judge's decision in this case. As correctly argued by employer, *Moody* represents controlling authority for the proposition that an employee is not entitled to receive a temporary total disability award after he voluntarily retires because there is no loss of wage-earning capacity due to the injury. As explained by the Board in *Moody*, 50 BRBS at 10, Section 2(10) of the Act provides that: "'Disability' means incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or any other employment[.]" 33 U.S.C. §902(10) (emphasis added). Thus, the disability inquiry encompasses both physical and economic considerations. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP* [*Chappell*], 592 F.2d 762, 10 BRBS 81 (4th Cir. 1979). Claimant bears the burden of establishing that his loss of wage-earning capacity is due to his work injury. *Moody*, 50 BRBS at 10; *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989). In a traumatic injury

claim for post-retirement disability compensation, the only relevant inquiry is whether claimant's work injury precluded his return to his usual work at the time of his retirement such that the loss of earning capacity was "because of injury." *Moody*, 50 BRBS at 10; *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45, 48 (1997).

In *Moody*, 50 BRBS 9, the Board reversed the administrative law judge's award of temporary total disability benefits for the period during which the claimant recuperated from shoulder surgery shortly after he had voluntarily retired. As claimant Moody continued working for his employer in a suitable position until his voluntary retirement, the Board held that he did not have a loss of wage-earning capacity "because of injury" within the meaning of Section 2(10), 33 U.S.C. §902(10). Reasoning that the claimant's retirement had already resulted in his complete loss of wage-earning capacity at the time of his surgery, the Board held that the claimant was not entitled to temporary total disability benefits for the post-retirement period during which he recovered from his work-related shoulder injury. 50 BRBS at 10-11.

The relevant facts in the case before us are virtually identical to those in *Moody*.[2] As in *Moody*, 50 BRBS at 11, claimant did not contend that his shoulder injury precluded his continued work for employer or had resulted in a loss of wage-earning capacity. Moreover, claimant expressly acknowledged that his retirement was voluntary. EX 11 at 5, 19; *see also* EX 12. Also as in *Moody*, claimant underwent shoulder surgery after his retirement and sought temporary total disability benefits for the period during which he recuperated from that surgery. Thus, the Board's decision in *Moody* controls the issue of claimant's entitlement to temporary total disability benefits in this case. In awarding post-retirement temporary total disability benefits for the period of claimant's recuperation from shoulder surgery, the administrative law judge in this case relied on the Board's decision in *Harmon*, 31 BRBS 45, and found distinguishable the Board's decision in *Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001). *See* Decision and Order at 21-25. We reject claimant's contention that the administrative law judge properly relied on *Harmon* and distinguished *Hoffman.* The same reasoning employed by the administrative law judge in this case regarding the Board's precedents in *Harmon* and *Hoffman* was specifically addressed and rejected by the Board in *Moody*. 50 BRBS at 10-11 and n.2. Therefore, for the reasons set forth in *Moody*, we reverse the administrative law judge's award of post-retirement temporary total disability compensation.[3] 33 U.S.C. §902(10); *Moody*, 50 BRBS 9; *Hoffman*, 35 BRBS 148.

[2] Although claimant summarily avers that *Moody* is distinguishable on the facts, *see* Cl. Resp. Br. at 2, he provides no support for this assertion.

[3] Claimant also contends that the decision of the Virginia Supreme Court in *McKeller v. Northrop Grumman Shipbuilding, Inc.*, 777 S.E.2d 857 (Va. 2015), supports his claim for temporary total disability benefits during the period of recovery from

As the administrative law judge found employer liable for all reasonable and necessary medical expenses under Section 7 of the Act, 33 U.S.C. §907, incurred in the treatment of claimant's left shoulder condition, *see* Decision and Order at 25, we are required to address employer's alternative argument that the administrative law judge erred in finding claimant's left shoulder condition to be causally related to the March 16, 2011 work incident.[4] Employer initially contends that the administrative law judge erred in invoking the Section 20(a), 33 U.S.C. §920(a) presumption. We disagree. In order to be entitled to the benefit of the Section 20(a) presumption, claimant must establish a prima facie case by establishing that he sustained a harm and that an accident occurred or working conditions existed which could have caused or aggravated the harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). Once claimant has established his prima facie case, Section 20(a) links his harm to his employment. *See Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); *see also Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

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surgery for a work-related injury. In *McKeller*, the Virginia Supreme Court concluded that an injured worker's retirement did not preclude him from receiving a temporary total disability award under Va. Code Ann. § 65.2-500 because his "incapacity for work" was total. *McKeller*, 777 S.E.2d at 862. This same argument regarding the *McKeller* decision was made by the claimant in *Moody* and was rejected by the Board in its unpublished Order on Reconsideration. *Moody v. Huntington Ingalls, Inc.*, BRB No. 15-0314 (May 10, 2016)(Order on Reconsideration). As the Board stated in the Order denying reconsideration in *Moody*, the Virginia statute and case law interpreting it are not instructive in this case because the Longshore Act specifically defines "disability" in Section 2(10), 33 U.S.C. §902(10). *See Jordan v. Va. Int'l Terminals,* 32 BRBS 32 (1998) (state law may be instructive where the Act does not define a term). Section 2(10) defines "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury. . . ." In this case, claimant's "incapacity to earn" the wages he was receiving at the time of injury was caused by his voluntary retirement from the workforce prior to his undergoing surgery. Therefore, claimant's disability is not compensable under the Act. *See Moody*, 50 BRBS at 10-11.

[4] We need not reach employer's additional assignment of error to the administrative law judge's finding that employer was not prejudiced by claimant's failure to give timely notice of the injury pursuant to Section 12 of the Act, 33 U.S.C. §912. We have reversed the administrative law judge's award of temporary total disability benefits, and medical benefits are not subject to the limitations periods of Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913. *Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994)(decision on recon. en banc).

In her Decision and Order, the administrative law judge invoked the Section 20(a) presumption based on her findings that claimant suffers from a harm, a left shoulder condition, and that the specific work incident on March 16, 2011 could have caused or aggravated that condition. Decision and Order at 14-15. The administrative law judge properly found that claimant established the harm element of his prima facie case based on evidence of the medical treatment, including surgery, that claimant received for his left shoulder condition. *Id.*; *see Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968) (en banc).

The administrative law judge further found that claimant established the occurrence of a work accident on March 16, 2011 that could have caused or aggravated claimant's left shoulder condition. Decision and Order at 15. In order to establish his prima facie case, claimant must "'at least allege an injury that arose in the course of employment as well as out of employment.'" *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT) (quoting *U.S. Industries/Federal Sheet Metal*, 455 U.S. 608, 14 BRBS 631); *see also Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990). In presenting his prima facie case, claimant is not required to introduce affirmative medical evidence that the accident or working conditions in fact caused his harm; rather, he must show that an accident occurred or that working conditions existed which could have caused or aggravated the harm. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39, 40 (2000); *see also Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). Finding claimant's testimony credible, the administrative law judge found that the second element of claimant's prima facie case was met by claimant's testimony regarding the March 16, 2011 incident in which he struck his head on the overhead protrusion and by Dr. Patel's treatment notes reflecting a shoulder injury at work and the October 12, 2011 MRI report noting a history of shoulder pain after trauma. Decision and Order at 15; CXs 6a-b, 7a. The administrative law judge's decision to credit claimant's testimony inasmuch as it pertains to invoking the Section 20(a) presumption is within her discretion. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant established the elements of his prima facie case, and the consequent application of Section 20(a) to presume that claimant's March 16, 2011 work incident caused or aggravated claimant's left shoulder condition. *See Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT).

Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut this presumed causal connection with substantial evidence that claimant's injury was not caused or aggravated by this incident at work. *See Holiday*, 591 F.3d 219, 43 BRBS 67(CRT). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion. *See*

Moore, 126 F.3d 256, 31 BRBS 119(CRT). We agree with employer that the administrative law judge's finding that employer failed to rebut the Section 20(a) presumption cannot be affirmed. Therefore, we vacate the administrative law judge's finding that the presumption was not rebutted and remand the case for reconsideration under the legally correct standard for rebuttal. Specifically, the administrative law judge erroneously evaluated the credibility of the medical evidence and weighed conflicting evidence in addressing whether employer rebutted the Section 20(a) presumption. This error requires that we remand for reconsideration of whether employer rebutted the presumption.

Employer's burden on rebuttal is to produce substantial evidence of the absence of a causal relationship between claimant's condition and his employment. *Holiday*, 591 F.3d at 226, 43 BRBS at 69-70(CRT); *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT). In this regard, the United States Court of Appeals for Fourth Circuit, within whose jurisdiction this case arises, has stated that:

> [t]he substantial evidence standard of proof requires the employer to put forward as much relevant factual matter as a reasonable mind would need to accept, as one rational conclusion, that the employee's injury did not arise out of his employment. [citation omitted] The standard requires more than a scintilla of evidence, but is not a preponderance standard. *Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 386 (4th Cir. 2000).

Holiday, 591 F.3d at 226, 43 BRBS at 69(CRT). The weighing of conflicting evidence or of the credibility of evidence "has no proper place in determining whether [employer] met its burden of production." *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651, 44 BRBS 47, 50(CRT) (9th Cir. 2010). "Instead, at the second step the ALJ's task is to decide, as a legal matter, whether the employer submitted evidence that could satisfy a reasonable factfinder that the claimant's injury was not work-related." *Id.*; *see also Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010) (the determination of whether employer produced substantial evidence is a legal judgment not dependent on credibility). If employer produces substantial evidence rebutting the Section 20(a) presumption, the presumption drops from the case and it is at this point of analysis that the administrative law judge must weigh the relevant evidence and make credibility assessments in order to address the causation issue based on the record as a whole, an issue on which claimant bears the ultimate burden of persuasion. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994).

Employer contends it presented both medical evidence and lay evidence that rebutted the Section 20(a) presumption and that the administrative law judge irrationally rejected such evidence on the basis that it was speculative or equivocal. The administrative law judge characterized employer's rebuttal medical evidence as

"equivocal, not credible, speculative, and not persuasive," and therefore concluded that this evidence is insufficient to rebut the presumption. Decision and Order at 19. This constitutes error, as the administrative law judge placed a burden of persuasion on employer; the determination of whether employer produced substantial evidence that could satisfy a reasonable fact-finder that claimant's condition is not work-related is a legal judgment not dependent on credibility.[5] *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT); *Fields*, 599 F.3d 47, 44 BRBS 13(CRT); *Holiday*, 591 F.3d at 226, 43 BRBS at 69(CRT); *Moore*, 126 F.3d at 263, 31 BRBS at 123(CRT). Moreover, as employer argues, the administrative law judge failed to consider the evidence contrary to claimant's testimony that the injury to his shoulder occurred as he alleged. Thus, this evidence also should be addressed on remand.[6] We therefore vacate the administrative law judge's finding that employer failed to rebut the Section 20(a) presumption and we remand the case for reconsideration of whether employer produced substantial evidence that claimant's shoulder condition was not caused or aggravated by the March 16, 2011 work incident.

We further vacate the administrative law judge's alternative finding that claimant established a causal relationship between his shoulder condition and his employment

[5] In addition, our review of the record reveals that the administrative law judge mischaracterized some of the record evidence. Specifically, the administrative law judge found Dr. Saveika's letter in response to employer's counsel's letter to be "inconclusive and equivocal" on the basis that it does not state the areas of the body which the doctor referenced and employer's letter is not in evidence. *See* Decision and Order at 8, 16. Contrary to the administrative law judge's finding, employer's letter is in evidence and a reading of that letter makes it clear that Dr. Saveika meant that claimant had not indicated an acute injury to his head, neck or shoulder in March 2011. EX 2 at 1-3. Moreover, the administrative law judge erroneously found that Dr. Saveika's November 16, 2011 medical records state "report to provider: NNSD, WC," and that this unequivocally supports that the doctor considered claimant's left shoulder condition to be a work-related injury. *See* Decision and Order at 16-19. The notation quoted by the administrative law judge, however, was not made by Dr. Saveika. Rather, it is found on the report of claimant's November 16, 2011 MRI signed by Dr. Salvador, a radiologist. CX 6e.

[6] In this respect, employer asserts that the administrative law judge failed to address evidence offered to show that the March 16, 2011 work incident could not have caused claimant's shoulder harm, i.e., evidence of the absence of a contemporaneous report of shoulder harm following the work incident which contradicts claimant's testimony that he had immediate shoulder pain which he reported to employer. *See, e.g.*, EX 1 at 2; EXs 2-4; EX 11 at 6. As the administrative law judge did not address this evidence at invocation, she should address it at rebuttal, and, if rebuttal is found, consider it in weighing the evidence as a whole.

based on the record as a whole. If, on remand, the administrative law judge finds the Section 20(a) presumption rebutted, she must reconsider, based on the record as a whole, whether claimant met his burden of establishing a causal relationship between the work incident and his shoulder condition.[7] *Moore*, 126 F.3d 256, 31 BRBS 119 (CRT); *see also Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43 (CRT).

Accordingly, the administrative law judge's award of compensation for temporary total disability from August 23, 2012 through October 2, 2012, is reversed. The administrative law judge's finding that claimant is entitled to invocation of the Section 20(a) presumption is affirmed. The administrative law judge's finding that employer did not rebut the Section 20(a) presumption and her alternative finding that claimant established that his shoulder condition is work-related based on the record as a whole are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge

[7] Claimant does not carry his burden of persuasion merely by establishing that the evidence of non-causation is not persuasive. Rather, claimant must establish, with affirmative medical opinions or other probative evidence, that his shoulder condition was caused or aggravated by the work incident. *See generally Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see also Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT).